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IN THE

Supreme Court of the United States

October Term, 1976

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

CHARLES MacDONALD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Opinion Below

Criminal complaint filed against three defendants in connection with their exhibition of two motion pictures was quashed by order entered in M-24 in the Court of Common Pleas, York County, and one defendant's preliminary objections to injunction sought by Commonwealth to enjoin future exhibition of motion pictures were sustained in order entered in 34 May Term, 1974, in the Court of Common Pleas, York County, and Commonwealth's appeals were consolidated. The Supreme Court, Nos. 20, 21 May Term, 1975, Roberts, J., held that statute which prohibits, *inter alia,* exhibiting of obscene photographs, figures or images but which does not specifically define forbidden conduct, could not constitutionally be applied to criminally punish expression on basis of

allegedly obscene content of motion pictures unless and until amended to specifically define forbidden conduct; that determination of what constituted common or public nuisance under statute prohibiting common or public nuisance was not sufficiently specific to be utilized to criminally punish expression on basis of motion pictures' allegedly obscene content; that Commonwealth was not entitled under theory of common law public nuisance to enjoin future showing of allegedly obscene motion pictures; and that motion pictures could not be enjoined under statute authorizing injunctive proceedings to prevent exhibition of any obscene photograph, figure, or image until adequate definition of prohibited conduct was supplied by General Assembly.

Jurisdiction

The judgment of the Pennsylvania Supreme Court was entered on October 30, 1975. A copy of such judgment appears in Supplementary Appendix. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

Question Presented

Is a statute embodying the *Miller v. California* test constitutionally necessary for a state to regulate hard core pornography or is it Constitutional permissible for a state to use the Common Law through the filing of a complaint in equity to define the standards of obscenity and in the same proceeding grant relief in prohibiting its sale and display.

Constitutional Provisions Involved

The First and Fourteenth Amendments to the Constitution.

Statement of Facts

This is an equity action against a motion picture owner to enjoin the public display of two films alleged to be obscene. The Complaint (see Supplementary Appendix) was filed by the District Attorney on behalf of the Commonwealth of Pennsylvania on April 30, 1974.

On May 10, 1974 the Defendant filed Preliminary Objections. The objections involved a demurrer and questioned the Constitutional basis for such an action. The case was submitted upon briefs of both parties.

On June 7, 1974 the Court of Common Pleas of York County by President Judge Robert I. Shadle sustained the Preliminary Objections in the nature of a demurrer and dismissed the plaintiff's complaint. The plaintiff immediately appealed to the Supreme Court of Pennsylvania.

The Supreme Court of Pennsylvania on October 30, 1975 (see Supplementary Appendix) held that in effect the Common Law could not be used to regulate pornography, citing the *Grove Press Inc. v. The City of Philadelphia,* 418 F2d 83 (3rd circuit 1969). The Court held that the Common Law could not be used . . . "both to define the standards of protected speech and to serve as a vehicle for its restraint."

Reason for Granting the Writ

The Constitution of the United States specifically in regard to the first Amendment and the Due Process Clause of the 14th Amendment should not prohibit regulation of pornography using the complaint in equity which is a Common Law procedure. In this case the Complaint alleges that on April 17 and April 18, 1974, the Defendant obtained, advertised and displayed two films. These two

films were entitled "Deep Throat" and "The Devil and Miss. Jones." Both of these films were shown as part of a double feature at the Southern Theatre in York, York County, Pennsylvania.

"Deep Throat" is a sound motion picture in color with a running time of about one hour. The film portrays a woman who repeatedly perpetrates acts of fellatio. These acts are clearly displayed. In one scene, two nude males and one nude female engage in various sexual acts including cunnilingus and fellatio. In this movie there is the repeated showing of human male and female genitals in a state of sexual excitement.

The sexual scenes depicted appeal to the prurient interests, are patently offensive and have no serious literary, artistic, political or scientific value.

The said movie is obscene as obscenity has been defined by the Supreme Court of the United States in *Miller vs. California,* 93 S.Ct. 2607 (1973), and constitutes hard core pornography.

"The Devil and Miss Jones" is also a sound motion picture in color with a running time of approximately one hour. This film is about a virgin who committed suicide and was sent to a "reviewer" in hell. It was the reviewer's purpose to determine what should happen to Miss Jones.

Miss Jones indicated she wanted to go back and live for a little more time "Just for lust". She was introduced to a man who called himself the "teacher". The teacher taught her various sexual acts. In film she graphically engages in acts of fellatio, cunnilingus and in one scene she sucks upon the head of a live snake. This film has scenes where fruit, such as apples and grapes, are placed into the vagina and rectum, and then removed and eaten.

The sexual scenes depicted appeal to the prurient interests, are patently offensive and have no serious literary, artistic, political or scientific value.

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Even though the Defendant has the right to be informed of what is sought to be proscribed, this notice must not necessarily be given by a statute. Such notice can be given by a complaint. The Court should be able to authoritatively construe the Common Law so as to allow regulation under the First Amendment and in the absence of a statute a municipality may remedy the wrong by reverting to the standards of the Common Law.

"The power to determine the question of what will injuriously affect the public is lodged with the legislative branch of government." *Muglar v. Kansas,* 122 U.S. 205 at page 210 (December 5, 1887). A legislative act or judicial ruling which restricts a municipality's police power to combat commercial vice in the city, or limits a city's power to legislate on those matters considered necessary to safeguard public morality would constitute an unconstitutional abridgement of the fundamental rights under the federal Constitution. *Muglar v. Kansas,* 122 U.S. 205 at 210, 211. See also *Stone v. Mississippi,* 101 U.S. 816, where the U.S. Supreme Court noted

> No legislature can bargain away the public health, or the public morals. The people themselves cannot do it, much less their servants . . . government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.

The State is the source for the police power of a municipal corporation, in as much as, under our system of government, the police power was not surrendered to the federal government, but on the contrary, the States retained the power of enacting all such police regulations as to persons and property within their limits as do not encroach upon the powers of Congress to regulate commerce, nor conflict with the acts of Congress passed within the exercise of that power, nor deny rights guaranteed by the federal Constitution. Police power, exercisable by municipal corporations is, in turn, such as is delegated by the State.

The exercise of the police power is a governmental function, and the police power is ordinarily thought of as extending to anything relating to health or safety of the public which comes within the scope of municipal control, *Pennsylvania Company v. James,* 81 Pa. 194, or as concerning restriction on the use of property or conduct of persons detrimental to the public health, morals, or safety. *Philadelphia Electric Co. v. City of Philadelphia,* (1930) 152 At. 23, 301 Pa. 291. Also *Miller v. Seaman,* (1939) 8 At. 2d 415, 137 Pa. Super. 24.

It has been held that regulations must not be based upon any arbitrary desire to resist the natural operation of economic laws or purely esthetic considerations. *Scholl v. Borough of Yeadon,* (1942) 26 At.2d 135, 148 Pa. Super. 602. A case so holding, Appeal of White, (1926) 134 At. 409, 287 Pa. 259, however, cites U.S. Supreme Court as authority and it has now been held by the U.S. Supreme Court that, so far as federal constitutional prohibitions are concerned, it is within the legislative power to determine that a community should be beautiful as well as health, spacious as well as clean, well-balanced as well as carefully patrolled. *Burman v. Parker,* (1954) 75 Supreme Court 98.

It is also a well-recognized function of municipalities to promote and preserve public safety, morals, health, and general welfare. A municipality, by the exercise of police power, may determine its own standard of quietude. *Kistler v. Borough of Swarthmore,* (1939) 4 At.2d 244, 134 Pa. Super. 287.

The power being exercised by the County of York is one of the most basic powers of local government—the power possessed by municipal governments in aid of its duties to protect the public morals of the local community against the type of public conduct which is regarded as being *malum in se.* The term "morals" refers to the moral standards of the community; the norm or standard of behavior which struggles to make itself articulate in law. *Commonwealth v. Randle,* 133 At.2d 276, 279, and 183 Pa. Super. 603.

In addressing himself to the public morals issue and the preeminent power of local government to control the same, Woods describes the danger as being in the nature of "nuisance *per se.*" See the *Law of Nuisances* by H. G. Woods, Sections 23 and 24 at pages 45-46; the distinction between a public nuisance and a private nuisance is that a public nuisance is a nuisance that is common to all the community where it is committed as well as those of the public who may be travelling in that vicinity, while a private nuisance is one inflicting any injury personal to the party who is complaining or to his property. *Philips v. Davidson,* (1920) 112 At. 236, 269 Pa. 244. Public nuisance is an offense to the public rather than to certain persons. This may take the form of interfering with the comfortable enjoyment of life or property.

In Section 23, H.G. Woods describes the acts affecting public morals as public nuisances. He states there are

classes or kinds of businesses which are nuisances *per se* and the very fact that they are carried on in a public place is *prima facie* sufficient to establish the offense. See *Hudson v. Continental Oil Co., supra.* But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are classes of nuisances arising from the use of real property and from one's personal conduct that are nuisances *per se,* irrespective of the results and location, and the existence of which are only needed to prove in any locality, whether near or far removed from cities, towns, or human habitations to bring them within the purview of public nuisances. The Court has stated that a city should, as far as is practical, determine its own standards of quietude and other conditions under the police power. *Kistler v. Borough of Swarthmore,* (1939) 4 At. 2d 244, 134 Pa. Super. 287. Although not entitled to absolute quiet enjoyment of property, every person has the right to require a degree of quietude consistent with the standard of comfort prevailing in the locality wherein he lives. *Bedminister Township v. Vargo Dragway, Inc.,* (1969) 253 At.2d 659, 434 Pa. 100. This latter view are these intangible injuries which affect the morality of mankind and are in derogation of public morals and public decency.

In Section 24 of the *Law of Nuisances* by H.G. Woods is the concept of wrongs which are considered *malum in se.* This class of nuisances are of that aggravated class of wrongs, that, being *malum in se,* the Courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of

evil manners, and anything that produces these results finds no encouragement from the law, but is universally regarded and condemned by society as a public nuisance.

The municipal power is inherent in government itself and is so basic that its grant of authority is said to be "implied", and a flow from the Common Law rather than from "expressed" provisions in the city charter or the general law of the State. See the *Law of Nuisances,* Woods, Section 743 at page 972;

> Section 743—"No control over nuisances without special power—therefore, a municipal corporation had no control over nuisances existing within its corporate limits except as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance by Common Law or by statute, which is detrimental to the health of the inhabitants it may be abated by the authorities, but it must be a nuisance at Common Law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of expressed or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance and one which affects the health of the city, the abatement may be made by the authorities or by any person injured thereby. The Common Law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are injured by the thing abated.

Joyce, in his treatise "Law of Nuisance", Section 345, notes that this common law power entrusts the municipal corporation with not only the right, but the obligation to remove the nuisance; at page 498:

> The rule is delcared to be settled, without dissent, that without a special grant of authority, public

> corporations, may, as common law, power, cause the abatement of nuisances, and if a nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the Constitution.

Apart from specific statutes, the abatement of nuisances by municipalities is a common exercise of the governmental function, and municipal authorities have a right to prohibit or abate a public nuisance dangerous to health or safety of its citizens. *Borough of Tyrone v. Stevens,* (1897) 36 At. 166, 178 Pa. 543. Police power is thus available to suppress a nuisance whether it be offensive to hearing, smell, or sight. *Walnut and Quince Streets Corporation v. Mills,* (1931) 154 At. 29, 303 Pa. 25.

The importance of this municipal power was stressed by the U.S. Supreme Court in *James Phalen v. the Commonwealth of Virginia,* 12 L.Ed. 1030, 1033 (1850);

> The suppression of nuisances injurious to public health or morality is among the most important duties of government.
> It is a principle of the common law, that the King cannot sanction a nuisance . . .

It is respectfully submitted that the citizens of the County of York, Pennsylvania, as the citizens of the United States of America, have a federally protected right to live in the community whose public morals, moral values, and environment are free from the degrading and corrupting influences of patently hard-core pornography. One of the fundamental rights essential to the concept of well-ordered liberty, mainly the right to enjoy "common

decency" is to live in a community whose public morals, moral values, and environment are free from illegal, degrading, and corrupting influence. It is further submitted that the rights of common decency can be protected by the police power and the Home Rule authority which is inherent in municipal authorities and the Common Law.

It is respectfully submitted that a statute can be construed in light of the common law and *stare decisis.* The Pennsylvania Crimes Code, Act of December 6, 1972, P.L. .... No. 534 which sought to define and regulate obscene material was declared unconstitutional as a result of the United States Supreme Court decision in *Miller v. California,* 413 U.S. 15; 93 S.Ct. 2607, 37 L.Ed. (2d) 419 (1973). The Pennsylvania Supreme Court refused to "authoritatively construe" the statute to embody the *Miller v. California* test. The Pennsylvania statute clearly embodies the first part of the *Miller* test. The second and third parts are not set forth in the statute.

It is submitted that statutes are oftentimes the outline, leaving the details of the most vital importance to be filled in by judicial law making. The Supreme Court of Pennsylvania, using common law principles and *stare decisis,* could have construed the statute in light of *Miller v. Califonia.*

It is further submitted that a cause of action can be initiated without a statute and can be based upon the Common Law. The permanency of the Common Law, its cohesiveness and tradition, and the direction it gives to society makes it equal or coordinate to the authority of the statute. The mere fact that a statute is not available cannot deny common law protection. Where there is a wrong, whether there be a staute or not, there can be a remedy. This remedy can be sustained by reference to the Common Law.

It is further submitted that the statutes are the source of police power and its exercise is a legitimate governmental function to regulate the health, morals, and safety of a community. A municipality in the absence of a statute may remedy the wrong by reverting to the standards of the Common Law. A standard which is the slow fruit of a long-fought controversy between opposing interests.

The definition and regulation of obscenity are set forth in the *Miller v. California* test. The criteria of this test are:

1. whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest and

2. whether the work depicts or describes, in a patently offensive way, "sexual conduct specifically defined by the applicable state law," and

3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

A local community pursuant to police power and to abate what it considers a nuisance should be able to set forth standards based upon the long-standing tradition of *stare decisis* and the Common Law. Such standards, as they exist in *Miller v. California,* are clear and precise and could enforce equitable relief.

The law is *Miller v. California* and legislation is merely a supplement to or a re-definition of the Common Law as decided by the highest Court in the land.

It is respectfully submitted that the localities using the standards of *Miller v. California* can insure the health, safety, and morals within the scope of their municipal control.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari be granted.

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